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Supreme Court, U.S.
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In the
Supreme Court of the United States

BUILDING INDUSTRY ASSOCIATION
OF SUPERIOR CALIFORNIA, ET AL.,
Petitioners,

v.

GAIL NORTON, ET AL.,
Respondents,

ENVIRONMENTAL DEFENSE CENTER, ET AL.,
Respondents-Intervenors.

On Petition for Writ of Certiorari to United States Court of Appeals for the District of Columbia

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I

THE LISTING OF THE FAIRY SHRIMP ITSELF IS UNCONSTITUTIONAL

Federal Respondents take the untenable position that the listing of the fairy shrimp itself cannot be unconstitutional under the Commerce Clause[1] because the listing triggers a requirement under Section 7(a)(2), 16 U.S.C. § 1536(a)(2), of the Endangered Species Act (ESA) that all federal agencies must insure that their actions are "not likely to jeopardize the continued existence of any endangered species or threatened species." Brief of the Federal Respondents in Opposition (Fed. Opp.) at 11. Congress has ample authority, they claim, to protect endangered species or threatened species from the "activities of the federal government itself." *Id.* Perhaps so, but a restriction on federal activities is not the only result of the listing.

Federal Respondents conveniently ignore the fact that the listing also results in restrictions on purely private conduct on private land. In addition to Section 7(a)(2), the listing of the fairy shrimp also triggers Section 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B), that in Respondents' own words "prohibits takings of endangered species by all persons who do not have a permit or other authorization." *Id.* at 3. This "takings"

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[1] In a similar vein, Respondent Intervenors argue that Petitioners' challenge to the listing decision is not ripe because the listing is analogous to the adoption of a Management Plan in *Ohio Forestry v. Sierra Club*, 523 U.S. 726 (1998), which, according to Intervenors, was a mere programmatic decision that "did not cause significant practical harm to plaintiff's interest." Intervenor Respondent's Opposition at 6. But the analogy is misplaced. The listing of the fairy shrimp does cause significant practical harm to Petitioners' interests. Federal Respondents have acknowledged that Petitioners established their standing to sue in the district court by providing evidence that the listing alone depressed their land values, halted or impeded specific developments, and has cost them thousands of dollars for surveys and delays. *See* Fed. Opp. at 8.

prohibition is part and parcel of the listing and is not limited to "activities of the federal government itself." It applies across the board to all parties and places regulatory burdens even on private conduct that is both intrastate and noneconomic in nature and substantially interferes with local land use regulation, a traditional state function.

The term "take" is defined in the Act to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). By its own terms, the "takings" prohibition has nothing to do with interstate economic activity nor is it limited to federal action. Under this prohibition—automatically triggered by the listing—Petitioners may not engage in otherwise lawful, noneconomic activities that would harm the fairy shrimp. For example, without federal authorization, Petitioners may not rake, hoe, disc, drain, fill, or otherwise modify (or even enter) certain portions of their property, like the seasonal wetlands and puddles in which the fairy shrimp commonly thrive, if it would "take" the listed species. Simply filling a pothole on a dirt driveway in the species' range suddenly becomes a federal concern.

The listing of the fairy shrimp does more than restrict the conduct of federal agencies, it intrudes into the very heart of state functions, usurping local land use and controlling wholly private noncommercial activity. For this reason, the listing of the fairy shrimp itself is unconstitutional. As this Court has stated: "Thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."[2] *United States v. Morrison*, 529 U.S. 598, 613 (2000).

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[2] Except for a new population of vernal pool fairy shrimp discovered in Jackson County, Oregon, cited by Intervenors and reported at 65 Fed. Reg. 18026, 18028 (Apr. 6, 2000), outside the administrative record, the distribution of the other three listed species is limited to the State of California. Moreover, none of the four listed species found in California is known to cross state lines either on its own or as a regular commercial item.

Federal Respondents cannot save the ESA from a constitutional challenge by arguing that some provisions of the Act are within congressional authority while ignoring those provisions that are clearly without congressional authority. The listing of the fairy shrimp alone imposes regulatory burdens on private parties and falls outside the Commerce Clause.

II

THE RULING BELOW CONFLICTS WITH THIS COURT'S COMMERCE CLAUSE DECISIONS IN *LOPEZ* AND *MORRISON*

This case is governed by this Court's precedents in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598. But the court below failed to consider these precedents in upholding the listing of the fairy shrimp. In those cases, this Court established a framework for determining whether an item or activity has "substantial effects" on interstate commerce. To determine "substantial effects" this Court asks: (1) if the regulated object or activity is economic in nature; (2) if the statute has a jurisdictional element establishing through case-by-case analysis a connection to interstate commerce; (3) if the regulation intrudes in areas of traditional state concern; and (4) if the basis for the regulation has any logical stopping point.

In support of the ruling below, Federal Respondents argue only the first and third factors, apparently conceding (as they must) the second and fourth factors—that the ESA has no jurisdictional element establishing through case-by-case analysis a connection to interstate commerce and that the basis for the regulation of fairy shrimp has no logical stopping point, lapses this Court found fatal to the statutes at issue in *Lopez* and *Morrison*.

A. The Ruling Below Cannot Stand Because the Regulated Object or Activity Is Not Economic in Nature

Federal Respondents admit that the object of the listing—the fairy shrimp—is not economic in nature: "FWS, in listing the fairy shrimp species, did not identify evidence of the species' present commercial use . . . ." Fed. Opp. at 8.

However, in support of the ruling below (and *National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), on which the ruling relies), Federal Respondents argue that the statute itself creates the necessary economic connection. For example, they note that Petitioners have established that the listing of the fairy shrimp has "depressed their land values and development prospects, has halted or impeded specific developments, and has already cost them thousands of dollars for sampling surveys as well as costs of delay." Fed. Opp. at 8. Thus, Federal Respondents conclude that the "ESA's restrictions . . . as applied to petitioners, therefore, have a significant commercial nexus." *Id.* But this argument is circular and confuses the result of the regulation with the object of the regulation.

Federal Respondents essentially claim that Congress can create a Commerce Clause connection by passing a statute that imposes economic burdens on private conduct. This turns the law on its head. Under Federal Respondents' argument, Congress could regulate any object or activity that is *not* economic in nature so long as the regulation itself *creates* an economic impact. Thus, a federal law that prohibits one from removing weeds from one's yard would be a legitimate Commerce Clause enactment, according to Federal Respondents, if the law required one to obtain a permit for the weed removal.

This absurd result is the logical extension of Federal Respondents' argument. But Congress may not derive its constitutional authority from its own statutes. Every law enacted by Congress must be based on a power enumerated in the Constitution. *See Morrison*, 529 U.S. at 607. A Commerce Clause enactment, like the ESA, must therefore be based on an existing commercial nexus. The enactment itself cannot create the requisite commercial nexus, as Federal Respondents suggest. In this case, neither the fairy shrimp, nor the listing, nor the "ESA's restrictions" that have resulted in injury to the Petitioners, are economic in nature. The only economic activity Federal Respondents have identified is the cost of compliance. But this is constitutionally deficient. If Congress can bootstrap

Commerce Clause jurisdiction in such a manner, Congress can regulate anything.

B. This Court Has Rejected the Argument Relied on Below That Congress May Regulate Noneconomic Activity Based Solely on That Activity's Aggregate Effect

Undaunted by limitless Commerce Clause authority, Federal Respondents defend the ruling below with the argument advanced in *National Association of Home Builders* that "species are part of an interdependent web" and that the commercial significance of a "species cannot always be determined at a given point in time." Fed. Opp. at 8. Therefore, a "focus on the aggregate commercial significance of all listed species is particularly appropriate" in this case. *Id.* at 8-9. But this approach eviscerates the idea of a federal government of few and defined powers. First, it incorporates a theory that cannot be confirmed or denied—that all species are interdependent—and which could be extended with equal authority to the notion that all things (not just species) are interdependent; then, it reaches into the infinite by relying on speculative economic effects that sometime in the future may be significant if aggregated. If this were the legal standard for exercise of the Commere Clause Power, nothing would be beyond the reach of federal regulation.

Similar arguments were floated by the Federal Government in *Lopez* and *Morrison*, but were summarily dismissed by this Court. Such arguments, this Court stated, are

> substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected [in *Lopez*] as unworkable if we are to maintain the Constitution's enumeration of powers.

Morrison, 529 U.S. at 615.

Thus, in *Morrison* where the Court considered the validity under the Commerce Clause of a federal law that imposed civil penalties for gender-motivated violence , this Court held:

> We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local.

Morrison, 529 U.S. at 617-18.

If harm to people cannot be regulated under the Commerce Clause, how can harm to an obscure, intrastate, noncommercial species like the fairy shrimp be regulated under the Commerce Clause?

C. The Listing of the Fairy Shrimp Upheld in the Court Below Intrudes in Areas of Traditional State Concern

Whether the listing of the fairy shrimp intrudes in areas of traditional state concern has been conceded. As noted above, Federal Respondents have acknowledged that the listing of the fairy shrimp has, among other things, depressed Petitioners' land values and development prospects and halted or impeded specific developments. *See* Fed. Opp. at 8. In other words, the listing of the fairy shrimp has interfered with local land use regulation. This is clearly an area of traditional state concern. Indeed, this Court has held that regulation of land use is the quintessential state activity. *See FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982).

But Federal Respondents answer this claim with a diversion. Rather than refute the fact that the listing has interfered with local land use regulation, Federal Respondents change the subject and argue that the federal government may regulate wildlife in concert with the states. *See* Fed. Opp. at 9. This is no answer at all. Whatever power the federal government may have over wildlife, it has chosen to regulate for the benefit of wildlife through the Commerce Clause in a way that substantially interferes with an area of traditional state concern. "Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur

and political responsibility would become illusory." *Lopez*, 514 U.S. at 577. Thus, the decision below directly conflicts with this Court's rulings in *Lopez* and *Morrison* and review should be granted to resolve this conflict.

III

THE COURTS OF APPEAL HAVE NOT SETTLED ON A UNIFORM ANALYSIS OF THE CONSTITUTIONALITY OF THE ESA UNDER THE COMMERCE CLAUSE

The statement by Federal Respondents that "[t]he courts of appeal have uniformly sustained the constitutionality of the prohibition on takings of listed species established by Section 9 of the ESA" is pure hyperbole. A quick review of the cases cited bears this out. In *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000), the court of appeals did uphold prohibitions on the "taking" of the red wolf, but only upon a determination that the "taking" of red wolves, unlike the fairy shrimp in this case, was directly connected to interstate markets such as agricultural products and livestock. *See* 214 F.3d at 495. As for *United States v. Bramble*, 103 F.3d 1475 (9th Cir. 1997), that case involved the Bald Eagle Protection Act, not the ESA. And unlike the ESA, the Bald Eagle Protection Act was directed primarily at commercial activity. *See* 16 U.S.C. § 668(a) (prohibiting the taking, possession, sale, purchase, barter, offering to sell, purchase or barter, transportation, exploration or importation of Bald or Golden Eagles or their parts).

In *National Association of Home Builders*, on which the decision in this case is based, the majority simply could not agree on the proper analysis for upholding Section 9 of the ESA as a valid Commerce Clause enactment. In fact, the majority judges expressly rejected each other's holdings. *See* detailed discussion of this uncertain decision in Petition at 18-21. No other appellate court has ruled on the constitutionality of the ESA, including the Ninth Circuit in *Palila v. Hawaii Department of Land and Natural Resources*, 639 F.2d 495 (9th Cir. 1981), which did not address the issue. Thus, contrary to Federal Respondents' claim that the courts of appeal have uniformly upheld the constitutionality of the ESA under the Commerce Clause, there is no settled Commerce Clause

analysis whatsoever among the federal circuit courts. To give direction to the courts below, therefore, this Court should grant the Petition and address the validity of the ESA under Congress' Commerce Clause authority.

IV

THE RULING BELOW DIRECTLY CONFLICTS WITH THE NINTH CIRCUIT'S RULING IN *IDAHO FARM BUREAU FEDERATION v. BABBITT*

Respondents' claim that there is no conflict between the decision below and *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995), is without merit. In that case, the Ninth Circuit employed a notice and comment test entirely different than that applied by the appeals court below. In *Idaho Farm Bureau*, the court weighed a number of factors in determining that a scientific study was subject to public comment under the ESA and the Administrative Procedure Act (APA). Those factors included whether: (1) the study filled data gaps in the proposed rule; (2) the study provided unique data that was not duplicated in other reports; (3) the Fish and Wildlife Service relied largely on the study to support its final rule; and (4) the accuracy of important material in the record is in question. *See id.* at 1403. But in this case, the D.C. Circuit considered none of these factors. Instead, the court mechanically applied a narrow test that undermined the public information purposes of notice and comment. Contrary to the test applied by the Ninth Circuit on virtually identical facts, the test applied below turned only on whether the new study "rejected or modified" the proposed rule. *See* Appendix to Petition at B-8.

Had this case been before the Ninth Circuit, that court would have required a new round of notice and comment on the "Simovich Study." As explained in detail in the Petition, that study was put forward by the Service as the most complete study of California vernal pools ever undertaken. *See* Pet. at 26-29. It did more, therefore, than merely supplement or confirm existing data as the D.C. Circuit held.

The "Simovich Study" met the test established by the Ninth Circuit for invoking public notice and comment under the APA and ESA: (1) the study filled data gaps; (2) the study provided unique information; (3) the Service relied largely on the study to support its final rule; and (4) the accuracy of important material in the record was in question.

As further evidence that *Idaho Farm Bureau* is in direct conflict with the decision in this case, we cite the fact that the scientific study in *Idaho Farm Bureau* did not "reject or modify" the proposed rule any more than the "Simovich Study" did in this case. Thus, whereas in the D.C. Circuit the "Simovich Study," and data like it, need not be made available for public review, in the Ninth Circuit such data will be circulated for public comment. Review should be granted to resolve this conflict.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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Respectfully submitted,

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